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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 A.R., individually and on
4 behalf of all others similarly
5 situated, et al.,

6 Plaintiffs,

7 v.

15 Cv. 9242 (RMB)

8 CITY OF NEW YORK, et al.,

9 Defendants.

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September 7, 2016
11:45 a.m.

10 Before:

HON. RICHARD M. BERMAN

District Judge

11 APPEARANCES

12 BERANBAUM MENKEN LLP

Attorneys for Plaintiffs

13 SCOTT SIMPSON

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Attorneys for Plaintiffs

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21 FRANKIE & GENTILE, P.C.

Attorneys for Defendant Mayweather

22 JAMES FRANKIE

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(Case called)

THE COURT: My notes indicate that we need to accomplish at least one or two things today. One is to find out precisely what the status is of discovery and where the case is, and then also, or simultaneously, to find out what the status, if any, is of any settlement discussions or negotiations or where that stands.

So who wants to start?

MR. SIMPSON: Scott Simpson, Beranbaum Menken LLP, for the plaintiffs. Good morning, your Honor.

THE COURT: Good morning.

MR. SIMPSON: The parties are in discovery and, unfortunately, the process has been going very slowly. We have had conferences with Judge Fox. We had numerous meet and confers with the city, and it seems like repeatedly the city will set a self-imposed deadline to get things moving, and they have not been following these deadlines, which has been incredibly frustrating for moving the case along.

THE COURT: Can't the magistrate judge set some dates that are final? Why don't we just do that?

MR. SIMPSON: I think the next step, because the parties have been trying to work some of these issues out on their own, the next step is to contact Judge Fox and possibly ask for a more involved intervention on his part, possibly a conference every two weeks, is what we were thinking, to make

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1 sure the city has fulfilled its obligations.

2 I just want to let the Court know, in our conference
3 in late July with Judge Fox, he had advised the city to produce
4 a privilege log for example. The city has assumed that certain
5 documents were privileged. We have not received a privilege
6 log. We recently submitted to the city our second request for
7 production. We received a response on September 1. It seems
8 like the majority of the responses are: We are searching for
9 documents.

10 THE COURT: If it comes back to me, what I am going to
11 do, if you request, is I am going to set deadlines, and that's
12 going to be it. If those deadlines pass and there isn't
13 discovery, that will be held against the party who didn't make
14 discovery.

15 It's interesting. I have often had cases where there
16 have been delays, but once that happens, we set a deadline and
17 that's the end of it. And that's what is going to happen here.

18 MR. SIMPSON: I also want to let the Court know, one
19 looming issue that could potentially cause delays is, as the
20 Court is aware, the Department of Investigation in the Bronx
21 District Attorney's Office is conducting an investigation of
22 the allegations contained in this lawsuit. We are eager to
23 depose the named defendants, whose counsel are present here
24 today. However, with an ongoing investigation, their clients
25 aren't going to say anything with the specter of charges

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1 looming. However, they don't know if their clients are the
2 ones being investigated, the scope of the investigation, who
3 are the corrections officers who are being investigated.

4 I would ask that Mr. Gertzer, to get things moving,
5 contact the DOI and at least get a determination over whether
6 the defendants named in this case are indeed a target of
7 investigation, because if they are not, then we can move
8 forward with their depositions once paper discovery is
9 complete.

10 THE COURT: He might know that today.

11 MR. SIMPSON: I don't think he does, Judge.

12 THE COURT: Do you?

13 MR. GERTZER: No, I don't know, because DOI is not
14 going to tell me precisely what they are doing for their
15 investigation. When I had my conversation with them a couple
16 of months ago, right before our motion to stay the case
17 temporarily, I did discuss the issue with DOI. All they would
18 tell me is that they are conducting interviews of the various
19 complainants, who I presume include the named plaintiffs. They
20 aren't really willing to tell me any more than that, for
21 obvious reasons, and I would presume that to the extent they
22 are investigating the individual claims made by the various
23 people who have made complaints about what allegedly happened
24 at DOC jails, that the named defendants may very well be
25 subjects of investigation. Certainly not an unreasonable

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1 conclusion to come to.

2 MR. SIMPSON: If I may respond, Judge.

3 Word on the street is that the investigation is going
4 to take four to six months from July. So we are talking about
5 into the winter. It could be into the spring, could be into
6 next summer. What I am saying is that Mr. Gertzler can make
7 assumptions, we can all talk about the possibility that they
8 are investigating these defendants. I would like to see some
9 diligence on the city's part, sending something in writing,
10 getting a determination, or at least making an effort to find
11 out if these defendants are being investigated. And if the DOI
12 says, No, we are not responding, it's confidential, we are not
13 going to share that information, fine. But no effort at almost
14 any front in this case has been made to move things along.

15 THE COURT: That's not a complicated issue. I am sure
16 Mr. Gertzler will be happy to do something.

17 MR. GERTZER: I can reach out to DOI and ask them. If
18 they tell me no, they tell me no. I certainly do not want to
19 interfere in the investigation.

20 THE COURT: I understand.

21 MR. GERTZER: Also, your Honor, I would like to
22 respond to the allegations that we are dragging our feet in
23 discovery. That simply is not the case. We had a prior
24 meeting with Magistrate Fox. He directed us to turn over
25 certain discovery. We did that. Thereafter, plaintiffs

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1 conducted a deposition of a former official at the Board of
2 Corrections. The discovery demands which they reference relate
3 mainly to things that were requested at her deposition. We
4 just responded to that. We have been in discussions with ESI.
5 We are right now trying to accumulate the various e-mail
6 accounts for all the various officials that they wanted us to
7 conduct ESI on. That's all kinds of higher-up officials at DOC
8 and BOC. It all takes time, and we are doing this through the
9 summer.

10 THE COURT: What does Judge Fox say about the whole
11 thing?

12 MR. AUDAIN: Judge Fox ordered the city to produce
13 revised initial disclosures. Judge Fox also ordered that the
14 city produce a privilege log. Mr. Gertzler informed Judge Fox
15 that he hadn't actually reviewed the documents. He just
16 assumed based on the character of the documents that they were
17 privileged so he invoked the privilege. Judge Fox explained
18 that that's really not the right way to proceed, so he ordered
19 the production of a privilege log.

20 THE COURT: Do you have a date before Judge Fox
21 already or do you need to establish one if you want one?

22 MR. AUDAIN: We would like to establish one, and we
23 would like to establish a semimonthly status conference.

24 THE COURT: You're going to propose that to him?

25 MR. AUDAIN: Yes, your Honor.

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1 THE COURT: It might help if you got a transcript of
2 today's proceeding and gave it to Judge Fox so he could see
3 what was discussed here exactly. It would be helpful, it seems
4 to me, to the extent this is doable, but Judge Fox is an expert
5 in these matters so I am sure he can take care of them, to get
6 some closure, or as much closure as possible under the
7 circumstances here, but I will leave that to you all and Judge
8 Fox.

9 It doesn't sound like settlement has been high on the
10 agenda among all of you; is that fair to say?

11 MR. SIMPSON: We are always open to talking about
12 settlement.

13 THE COURT: But you haven't.

14 MR. SIMPSON: No, we have not.

15 MR. GERTZER: We haven't yet received a demand from
16 plaintiffs. So I don't know what they are seeking.

17 THE COURT: Is there anything to be gained by trying
18 to have any conversations with me and each side or it's too
19 early?

20 MR. SIMPSON: I would say, Judge, while I appreciate
21 the Court's efforts to get discussions moving, our position is
22 that any discussion would be more fruitful once the city
23 fulfills its obligation to turn over discovery.

24 MR. GERTZER: We would also like to take some
25 discovery from plaintiffs as well before we have those

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1 discussions.

2 THE COURT: When do you think realistically would be a
3 good time to come back here for me to know what the status of
4 things are?

5 MR. AUDAIN: The status of things in terms of what, in
6 terms of the progress of discovery?

7 THE COURT: When I should set a trial date.

8 MR. AUDAIN: Had your Honor asked me in January what
9 would have been reasonable, I would have said --

10 THE COURT: You would have said today.

11 MR. AUDAIN: Seeing how glacially this case has
12 progressed, I dare not predict.

13 THE COURT: I don't want to just have you here
14 unnecessarily.

15 MR. AUDAIN: This is not unnecessary at all, your
16 Honor. This really helps keep the case moving. We found that
17 the more the Court is involved, the more the city fulfills its
18 obligations.

19 THE COURT: What might be a date that it might be
20 helpful again?

21 MR. AUDAIN: If your Honor is available in November, I
22 think that would be great.

23 THE COURT: I certainly am.

24 Here's the thing. I will set a November date, but you
25 can tell me before it and we can change it if December or

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1 January is more sensible.

2 MR. GERTZER: Your Honor, I am going to be on vacation
3 the last two weeks of November.

4 THE COURT: So December is better for you, early
5 December?

6 MR. GERTZER: Yes, your Honor.

7 THE COURT: In the meantime you will have gone at
8 least once or twice to Judge Fox, right?

9 MR. AUDAIN: Yes, your Honor.

10 THE COURT: Let's say 9:15 on December 5. We will
11 call it a status conference.

12 MR. AUDAIN: Just a matter of housekeeping. I would
13 just like the Court to be aware I am no longer with the firm of
14 Giskan Solotaroff. I am now at the NAACP Legal Defense and
15 Educational Fund. My office is in the process of getting
16 together the paperwork necessary to change that information on
17 ECF.

18 THE COURT: So it's just really that change. It
19 doesn't mean you're out of the case.

20 MR. AUDAIN: I'm not out of the case.

21 THE COURT: Just a different employer.

22 MR. AUDAIN: That's correct, your Honor.

23 THE COURT: Thanks. Good to see you.

24 (Adjourned)
25